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No. 03-

IN THE

Supreme Court of the United States

SAFETY NATIONAL CASUALTY CORPORATION,

Petitioner,

v.

SHOOK & FLETCHER ASBESTOS SETTLEMENT TRUST,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This Court, in advancing the federal policy favoring binding arbitration under the Federal Arbitration Act (FAA), has held a court's role in an arbitration is limited to matters of "arbitrability," with all other questions reserved for the arbitrator, including "what *kind of arbitration proceeding* the parties agreed to." *Green Tree Fin. Corp. v. Bazzle*, __ U.S. __, 123 S. Ct. 2402, 2407 (2003) (emphasis in original). Once a court concludes the parties are subject to an agreement to arbitrate their dispute, the arbitrator decides all procedural questions that bear on its "final disposition." *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002). In the Eighth Circuit, which held the arbitrators in this case were without authority to declare their decision to be binding, "arbitrability" is not a portal to arbitration, but instead a gateway to litigation.

The questions presented are:

1. Does an arbitration panel or a court decide whether arbitration is binding? The Eighth Circuit held the latter.

2. Is arbitration binding or a threshold to litigation? The Eighth Circuit held the latter.

3. Are the findings of fact by an arbitration panel entitled to deference or may a federal court of appeals develop its own view of the facts? The Eighth Circuit held the latter.

STATEMENT UNDER RULE 29.6

Petitioner Safety National Casualty Corporation and Respondent Shook & Fletcher Asbestos Settlement Trust are the parties to this proceeding.

Petitioner Safety National Casualty Corporation states that Delphi Financial Group, a publicly held company, holds one hundred percent of its stock.

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Petitioner Safety National Casualty Corporation respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit to preserve arbitration as an alternative to litigation and to resolve the conflict between the Eighth Circuit's opinion and the Court's decision in *Green Tree Fin. Corp. v. Bazzle*, __ U.S. __, 123 S. Ct. 2402 (2003).

OPINIONS BELOW

The district court's memorandum and order (per Jackson, D.J.) is unpublished and appears at Pet. App. 4a-9a. The *per curiam* opinion of the United States Court of Appeals for the Eighth Circuit (per Loken, C.J., Fagg, J., and Arnold, J.) is unpublished, but is available on Westlaw at 2003 WL 22391526 (8th Cir.). Pet. App. 1a-3a. The Eighth Circuit relied in this case on its earlier decision in *Dow Corning Corp. v. Safety Nat'l Cas. Corp.*, 335 F.3d 742 (8th Cir. 2003), which was published and is now on petition to this Court as No. 03-790. The Eighth Circuit's order denying rehearing and rehearing *en banc* is not otherwise published. Pet. App. 16a.

STATEMENT OF JURISDICTION

The Eighth Circuit's judgment was entered on October 21, 2003. Pet. App. 1a-3a. The Eighth Circuit entered an order denying a timely petition for rehearing and rehearing *en banc* on November 24, 2003. Pet. App. 16a.

Petitioner invokes the Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-16, mandates the enforcement of the terms of arbitration agreements contained in contracts evidencing transactions in interstate commerce. Under section 2 of the FAA, arbitration agreements shall be "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2.

STATEMENT OF THE CASE

Insurance policies commonly have arbitration provisions; Safety's policies do.

Safety issued an excess general liability insurance policy to Shook & Fletcher Insulation Company for the period August 16, 1983, to December 31, 1983. Pet. App. 17a. The policy, which afforded coverage of $5 million, included a mandatory arbitration provision, which provided:

> As a condition precedent to any right of action under this Policy, any dispute arising out of this Policy shall be submitted to the decision of a board of arbitration. . . . Pet. App. 17a.

The provision specified that the "members of the board shall be active or retired, disinterested officials of insurance or reinsurance companies," and required the board to "make its decision with regard to the custom and usage of the insurance and reinsurance business." Pet. App. 17a.

Shook & Fletcher sought coverage under Safety's policy for asbestos liabilities. Safety moved to compel arbitration according to the arbitration clause. On November 6, 1997, the Tenth Judicial Circuit Court of Alabama ordered the parties "to arbitrate the issues involving [the policy]." Pet. App. 14a-15a. Shook & Fletcher did not appeal this order.

Per the arbitration clause, the three-member panel of arbitrators was comprised of one member selected by Shook & Fletcher, one member selected by Safety, and an umpire. Pet. App. 17a. After a hearing, the arbitrators issued their decision. *Id.* 10a-13a. They unanimously declared their decision to be binding on both parties. *Id.* 10a. They also unanimously ruled for Shook & Fletcher and against Safety on Safety's defenses based on material misrepresentation and known loss. *Id.* Finally, in a two-one decision, they ruled for Safety and against Shook & Fletcher on certain coverage issues. *Id.* 10a-12a.

Following the arbitrators' decision, Shook & Fletcher filed a motion to vacate in the United States District Court for the Eastern District of Missouri. The district court, which had jurisdiction under 28 U.S.C. § 1332 and 9 U.S.C. § 10(a), granted Shook & Fletcher's motion, in part, and denied it, in part. Pet. App. 4a-9a. The district court held the arbitration was non-binding and vacated that part of the award. *Id.* 8a.

Safety appealed to the United States Court of Appeals for the Eighth Circuit. The Eighth Circuit affirmed, citing its decision in *Dow Corning Corp. v. Safety Nat'l Cas. Corp.*, *supra*[1], in which the court addressed an identical arbitration clause. Pet. App. 1a-3a.

This petition for a writ of certiorari followed the Eighth Circuit's denial of Safety's timely filed petition for rehearing and rehearing *en banc*.

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1. Pending on a Petition for a Writ of Certiorari and docketed as No. 03-790.

REASONS FOR GRANTING THE PETITION

I. The Eighth Circuit's Decision Conflicts With The Court's Most Recent Arbitration Precedent Addressing The Scope Of Arbitrator Authority, *Green Tree Fin. Corp. v. Bazzle* -- An Arbitrator, And Not The Court, Decides What Kind Of Arbitration Proceeding The Parties Have Agreed To, Including All Procedural Matters Affecting The Arbitration's Final Disposition.

The question presented is one of importance to all parties to arbitration agreements and in particular to the insurance industry which resolves by binding arbitration billions of dollars of disputes quietly, efficiently, and without enormous expense. This case is the first offspring of the Eighth Circuit's decision in *Dow Corning Corp. v. Safety Nat'l Cas. Corp.*, 335 F.3d 742 (8th Cir. 2003), in which the court held that arbitrators are without authority to decide the procedural issue of whether their decisions are to be binding, a procedural determination affecting what type of arbitration proceeding the parties agreed to.

This case will not be the last one on this issue, due to the prevalence of the language in Safety's arbitration clause in other commercial, insurance, and reinsurance agreements. The Eighth Circuit's decisions in this case and *Dow Corning* will be precedent for all "losers" in arbitration who will contend that arbitration is a prelude to litigation. This seed should not be allowed to germinate.

One consistent theme emerges from the Court's arbitration decisions: the jealous protection of the federal policy favoring the resolution of disputes by binding arbitration. "The [FAA] establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or

a like defense to arbitrability." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983).

In advancing this policy, the Court has limited the role of the courts to "gateway" questions of arbitrability. *Pacificare Health Systems, Inc. v. Book*, __ U.S. __, 123 S. Ct. 1531, 1536 n.2 (2003); *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83-84 (2002). "Arbitrability" concerns the narrow issue of whether an agreement creates a duty for the parties to arbitrate a particular dispute. *AT&T Technologies, Inc. v. Communications Workers of Am.*, 475 U.S. 643, 649 (1986). A judicial determination that the parties have agreed to arbitrate their dispute terminates the court's powers. *Id.* at 651.

In *Green Tree Fin. Corp. v. Bazzle*, __ U.S. __, 123 S. Ct. 2402 (2003), the Court distinguished between questions of arbitrability – which are for a court to decide – and questions of substance and arbitration procedure – which are for an arbitrator to decide. Arbitrability concerns the validity of an arbitration clause or its application to an underlying dispute. *Green Tree*, 123 S. Ct. at 2407.

Arbitrability, however, does not embrace matters of contract interpretation and arbitration procedure. *Id.* Nor does arbitrability address "what *kind of arbitration proceeding* the parties agreed to." *Id.* (emphasis in original). These questions are reserved for the arbitrator to decide. Once a court concludes a dispute is arbitrable, all other questions are for the arbitrator to resolve, including procedural questions that grow out of the dispute and which affect its "final disposition." *Howsam*, 537 U.S. at 84 (citing *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 557 (1964)) (emphasis added).

The Eighth Circuit's decisions in this case and in *Dow Corning Corp. v. Safety Nat'l Cas. Corp.*, 335 F.3d 742 (8th Cir. 2003), conflict with these precepts of the Court's arbitration jurisprudence. The "final and binding" issue is not a question of arbitrability. Rather, it is a procedural issue and a matter of contract determination for the arbitrator to resolve.

In conflict with the Court's precedent limiting the judiciary's role to "gateway" issues of arbitrability, the Eighth Circuit has authorized the courts to decide matters of contract interpretation and arbitration procedure, including the power to decide what kind of arbitration the parties have agreed to, under the guise that these issues go to the scope of arbitrator authority. Certiorari is necessary to preserve the last twenty years of the Court's arbitration jurisprudence which promotes the federal policy for binding arbitration by reserving for arbitrators all issues, except the narrow question of whether the parties have agreed to arbitrate their dispute.

A. "What Kind Of Arbitration Proceeding The Parties Agreed To" Is Not An Issue Of "Arbitrability."

The Court's pronouncement that arbitrability is an issue for the courts has been heard and understood by the judiciary. However, the Court's mandate limiting "arbitrability" questions to "gateway" issues has not been heeded. This case and *Dow Corning* present the opportunity for the Court to quell expansive interpretations of arbitrability that conflict with the Court's precedent and undermine the federal policy for binding arbitration.

The Eighth Circuit – in this case and *Dow Corning* – held the issue of whether the parties had contracted for binding or non-binding arbitration went to the scope of the arbitrators' authority and was, therefore, beyond their authority to resolve. Pet. App. 2a; *Dow Corning Corp.*, 335 F.3d at 747. Similarly,

the Third Circuit has held that "because the court must determine the duty to arbitrate from an interpretation of the collective bargaining agreement, it also has the task of determining the dispositive effect to be given to an award – again, by construing the contract." *Orlando v. Interstate Container Corp.*, 100 F.3d 296, 300 (3d Cir. 1996). These decisions misinterpret the term "arbitrability" and delegate to the courts questions that are the exclusive province of arbitrators.

The decisions of the Eighth and Third Circuits also conflict with the Court's most recent arbitration decision, *Green Tree Fin. Corp. v. Bazzle*, __ U.S. __, 123 S. Ct. 2402 (2003), which was decided two weeks before the Eighth Circuit's decision in *Dow Corning* and four months before the Eighth Circuit's decision in this case. In this case and *Dow Corning*, the Eighth Circuit did not address the Court's decision in *Green Tree*, which removes all doubt that the arbitrators acted within their authority in deciding what type of arbitration the parties had agreed to, including whether the proceeding was binding or not.

In *Green Tree*, the Court addressed the judiciary's limited role in arbitrations when it considered the interplay between class actions and arbitrations. The parties' agreement, a broad-form arbitration clause, provided for the arbitration of "'[a]ll disputes, claims, or controversies arising from or relating to this contract or the relationships which result from this contract.'" 123 S. Ct. at 2407. In vacating the lower court's decision, the Court held that although the contract did not mention class actions by name, it was for the arbitrator, rather than for the courts, to decide whether the contract contemplated class action arbitration. *Id.* The Court concluded the dispute over class action arbitration did not come within the "limited circumstances" where courts assume the parties intended a court, and not an arbitrator, to decide a particular arbitration matter. *Id.* The Court held this "narrow exception" did not apply to the

parties' dispute because their conflict did not concern the arbitration clause's validity or its application to the dispute. *Id.*

The Court distinguished between questions of arbitrability, which are for the courts to decide, and questions of substance and procedure, which are for the arbitrators to decide. The Court held the parties' dispute – whether the contract permitted class action arbitration – went to "what *kind of arbitration proceeding* the parties agreed to." *Id.* (emphasis in original). As the question concerned "contract interpretation and arbitration procedures," the Court held the issue was one for the arbitrators to decide. *Id.* The Court explained:

> Arbitrators are well situated to answer that question. Given these considerations, along with the arbitration contracts' sweeping language concerning the scope of questions committed to arbitration, this matter of contract interpretation should be for the arbitrator, not the courts, to decide.

Id.

The oral argument transcript from *Green Tree* demonstrates it was the Court, not the parties, which steered resolution of the dispute into the arbitrators' domain. Justice Breyer asked: "Well, . . . if it's disputable, why shouldn't the arbitrator decide that?" *Green Tree Fin. Corp. v. Bazzle*, 2003 WL 1989562, Oral Argument at 19 (Apr. 22, 2003). Green Tree's counsel took the position that the question (whether the arbitration clause covered class actions) went to the core of the arbitrator's authority and thus should not be decided by the arbitrator. Justice Breyer disagreed:

> No, but wait. There is a case, including one I just wrote, I think, for the Court which makes very clear that what you send to the arbitrator – I mean, there

> are dozens of cases where you have a phrase in a contract, and that's in dispute, and the parties have agreed we send disputes about the meaning of the contract to arbitration, you send that to the arbitrator.
>
> I mean, the only things that you don't are whether there's the arbitration contract is itself valid, et cetera. . . .
>
> What I have in front of me is a contract. It says, in this phrase, disputes will be arbitrated, there is a question, what does that mean, that word arbitration in this contract, and then I know that the parties have agreed to arbitrate the meaning of the dispute, all right – of any phrase – including that one.

Id. at 20-22.

The Court's *Green Tree* decision compels only one conclusion in this case. The arbitrators acted within their authority when they decided the parties' contract called for binding arbitration. This question did not concern a "gateway" matter of arbitrability. The validity of the arbitration clause or its application to the dispute was not at issue.

The parties' agreement provided that "any dispute arising out of this Policy" would be arbitrated. Pet. App. 17a. There was a question between the parties about whether the word "arbitration" meant a binding or non-binding result. That is a question of "what *kind of arbitration proceeding* the parties agreed to." *Green Tree Fin. Corp.*, 123 S. Ct. at 2407 (emphasis in original). Thus, the issue was properly decided by the arbitrators. Indeed, the issue preserved for the arbitrators in *Green Tree* (whether the arbitrators had the power to hear a class action) is closer to a question of "the scope of their authority" than the issue whether Safety and Shook & Fletcher

had agreed to final and binding arbitration. The arbitrators here did not decide the scope of their authority; they decided whether Safety and Shook & Fletcher had agreed that they would next go to court to argue about the arbitration award itself or to argue about the coverage issues on the merits.

The district court and the Eighth Circuit overstepped their bounds, in violation of the Court's directions, by deciding the binding/non-binding issue themselves. The "final and binding" issue is not a question of arbitrability.

The very words used by the Eighth Circuit in *Dow Corning Corp. v. Safety Nat'l Cas. Corp.*, 335 F.3d 742 (8th Cir. 2003), which provides the only authority for its decision in this case, demonstrate the court treaded where it should not go. Addressing the "condition precedent" language in *Dow Corning*, the Eighth Circuit wrote: "Though the clause suggests that arbitration of a policy dispute will be followed by litigation, and thus is non-binding, like the district court *we do not find this textual clue conclusive*. It can also be read as simply recognizing that even binding litigation is often followed by litigation." 335 F.3d at 745-46 (emphasis added). The Eighth Circuit took it upon itself to "determine whether the parties to these 1983 excess liability insurance policies intended to contract for binding arbitration." *Id.* at 746. In so doing, the court, in this case and in *Dow Corning*, openly engaged in contract interpretation.

However, that task is reserved for arbitrators. *Green Tree Fin. Corp.*, 123 S. Ct. at 2407. Once a court finds the parties have agreed to arbitrate their dispute, questions of contract interpretation are for the arbitrator to decide. *Id.*; *AT&T Technologies, Inc.*, 475 U.S. at 651.

The Eighth Circuit's reliance in *Dow Corning* on the Court's decision in *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995), to support its conclusion that the arbitrators were

without authority to declare their decision to be binding is misplaced and confuses the nature of an arbitrability determination. *Dow Corning*, 335 F.3d at 747. Unlike this case, *First Options* involved a "gateway" question of arbitrability, namely, whether the parties had agreed to arbitrate their dispute, and the applicable appellate standard of review for that question. 514 U.S. at 942-47.

Any doubt about the narrowness of the Court's decision in *First Options* was dispelled by the Court's subsequent decisions in *Pacificare Health Systems, Inc. v. Book*, __ U.S. __, 123 S. Ct. 1531 (2003), and *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002). In both cases, neither of which the Eighth Circuit addressed in this case or in *Dow Corning*, the Court held "the phrase 'question of arbitrability' has a . . . limited scope" and applies to "gateway" issues only. *Pacificare Health Systems, Inc.*, 123 S. Ct. at 1536 n.2; *Howsam*, 537 U.S. at 83-84.

Here, there were no threshold issues of arbitrability. It is undisputed that Shook & Fletcher and Safety were subject to a valid arbitration agreement that called for mandatory arbitration of all disputes arising out of the insurance policy. Pet. App. 17a. The Eighth Circuit's opinion conflicts with the Court's decision in *Howsam*, which holds that all procedural questions affecting a dispute's final disposition are "presumptively" for the arbitrator to decide. 537 U.S. at 84. "Once it is determined . . . that the parties are obligated to submit the subject matter of a dispute to arbitration, 'procedural' questions which grow out of the dispute and bear on its *final disposition* should be left to the arbitrator." *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 557 (1964) (emphasis added).

This Court should review the Eighth Circuit's decisions in this case and *Dow Corning*. The Eighth Circuit's decisions

conflict with the Court's leading arbitration decisions by denying arbitrators the authority to decide matters of contract interpretation and arbitration procedure and by granting the courts the power to decide what the parties intended when they entered into their contracts. As the Eighth Circuit's decisions are in direct conflict with the Court's precedent concerning the limited scope of "arbitrability" questions, certiorari should issue.

B. The Question Whether Arbitrators Have The Authority To Decide "What Kind Of Arbitration Proceeding The Parties Agreed To" Presents An Important And Recurring Issue That Warrants The Court's Review.

This case has future and practical significance and warrants the Court's review. Rather than confining the courts' role in arbitrations to "gateway" questions of "arbitrability," the Eighth Circuit's decisions make arbitration nothing more than a prelude to litigation and call into question the efficacy of common-place, broad-form arbitration clauses, which are typical in many types of commercial agreements, including insurance policies and reinsurance treaties.

1. The Eighth Circuit's decisions have far reaching consequences.

The rule in the Eighth Circuit that the courts, rather than the arbitrators, have the exclusive authority to decide what the parties meant by their agreement to arbitrate has far-reaching consequences. The immediate violence done by the Eighth Circuit's decisions is that it has ruled that a court, rather than a panel of arbitrators, is the entity that should decide the parties' intentions. The big-picture result of that conclusion is that arbitration loses its luster as an effective dispute resolution mechanism.

The Eighth Circuit's decisions are especially injurious to parties to insurance contracts and reinsurance treaties. With no citation to authority, no explanation, and no factual support, the Eighth Circuit has excepted insurance coverage disputes from the federal policy favoring binding arbitration and, thus, destroyed the most pervasive form of insurance arbitration clause. *Dow Corning*, 335 F.3d at 746.

There is a "substantial federal concern for the enforcement of arbitration agreements." *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 728-29 (1996) (citation omitted). The federal policy's object is to achieve a final disposition of the parties' differences by trading the procedures of the courtroom for the simplicity, informality, and expedition of arbitration, which is a less expensive and faster means of dispute resolution. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31 (1991) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)); *see also Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 280 (1995) (citing H.R. REP. No. 97-542, at 13 (1982)). By taking an issue away from arbitrators and giving it to the courts, the Eighth Circuit has made arbitration harder, less expeditious, and more expensive. While this Court has been restricting the role of the courts in arbitration cases, the Eighth Circuit and the Third Circuit are expanding it.

The federal courts are unaccustomed to not exercising their authority. Left unchecked, they return to character. The decisions of the Eighth and Third Circuits evidence this weakness. Other courts will follow their example. That is without supervision.

Every day, arbitrators resolve conflicts and tension between contractual terms. They apply their particular field's expertise and experience in doing so. The Eighth Circuit's decisions threaten to open the door to courts cherry-picking discrete issues among parties and to limit the ability of arbitrators to resolve

them. By denigrating arbitrator authority, the Eighth Circuit's decisions can only promote the role of a court in deciding to confirm or vacate an arbitration award based on the court's view of the dispute's merits. That is not a result intended by the FAA or this Court's arbitration precedent. A reviewing court must affirm an arbitration award even if the court is convinced the arbitrators have "committed serious error." *United Paperworkers Intern'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 38 (1987). Therefore, certiorari should issue.

2. The language in Safety's arbitration clause appears in insurance policies that are or will be the subject of national and international contract disputes.

This case will not be the last to present issues concerning the scope of arbitrator authority. The type of arbitration clause in Safety's policies will be before the courts again. The Eighth Circuit has twice addressed the language in Safety's policies, in this case and in *Dow Corning Corp. v. Safety Nat'l Cas. Corp.*, 335 F.3d 742 (8th Cir. 2003).

Safety's arbitration provision is a typical, broad-form arbitration clause. As the clause provides for the arbitration of "any dispute arising out of this Policy" (Pet. App. 17a), it is the "paradigm" of a broad-form clause. *See Oldroyd v. Elmira Savings Bank, FSB*, 134 F.3d 72, 76 (2d Cir. 1998); *see also Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 406 (1967); *Progressive Cas. Ins. Co. v. C.A. Reaseguradora Nacional de Venezuela*, 991 F.2d 42, 48 n.9 (2d Cir. 1993). The clause conforms to the American Arbitration Association's recommended broad-form arbitration clause for commercial disputes. AMERICAN ARBITRATION ASS'N, COMMERCIAL ARBITRATION RULES AND MEDIATION PROCEDURES 2 (July 1, 2003) ("any controversy or claim arising out of or relating to this

contract"); 14 ERIC MILLS HOLMES, ET AL., HOLMES' APPLEMAN ON INSURANCE 2D, § 107.2 at 546 (LEXIS 1999). As observed by the Eighth Circuit in *Dow Corning*, the clause is also a typical provision in reinsurance treaties. 335 F.3d at 746.

The clause's "condition precedent" language is no less pervasive. The "condition precedent" language is common in the insurance and reinsurance arenas. The "condition precedent" language also appears in numerous reported cases. *See McKee v. Home Buyers Warranty Corp. II*, 45 F.2d 981, 985-86 (5th Cir. 1995) (home warranty); *Rainwater v. National Home Ins. Co.*, 944 F.2d 190, 194 (4th Cir. 1991) (home warranty); *Ringwelski v. Pederson*, 919 P.2d 957, 959 (Colo. Ct. App. 1996) (construction contract); *Kelleher v. Cersosimo*, 320 N.E.2d 840, 841 (Mass. Ct. App. 1974) (construction contract); and *Eisel v. Howell*, 155 A.2d 509, 512 (Md. 1959) (construction contract). This is so because the "condition precedent" language traces its lineage to "at least the early 1800's, when arbitration clauses were commonly used in English marine reinsurance contracts." 14 ERIC MILLS HOLMES, ET AL., HOLMES' APPLEMAN ON INSURANCE 2D, § 107.2 at 544 (LEXIS 1999).

The Eighth Circuit, in this case and *Dow Corning*, concluded, contrary to the arbitrators' decisions in both cases, that the phrase "condition precedent" meant the parties bargained for non-binding arbitration in the absence of extrinsic evidence that binding arbitration was intended. Pet. App. 2a-3a; 335 F.3d at 745-46. However, the phrase "condition precedent" does not denote non-binding arbitration. *McKee v. Home Buyers Warranty Corp. II*, 45 F.3d 981, 986 (5th Cir. 1995). Instead, the phrase applies to the confirmation process permitted by 9 U.S.C. § 9 or to other litigation in which the arbitration would be final, but part of a larger litigation context. *Rainwater v. National Home Ins. Co.*, 944 F.2d 190, 194 (4th Cir. 1991); *McKee*, 45 F.3d at 985-86.

"Condition precedent" language was first included in arbitration agreements at a time when the common law was hostile to arbitration. Using arbitration as a "condition precedent" would not oust the court of jurisdiction and thus would allow an arbitration to go forward; subsequent litigation would not address the merits of the dispute but would serve to transform the arbitration award into a judgment and provide for collection. "In a leading English case, this devise was successful." 15 JOHN E. MURRAY, JR., CORBIN ON CONTRACTS, § 1435 at 353 n. 94 (Matthew Bender 2001), *citing Scott v. Avery*, 5 H L. Cas. 811 (1856). Thus, where an insurance policy, by its terms, "makes arbitration a condition precedent to any right of action, a suit can only be maintained to recover the amount of the award, or if it is invalid, the insured must allege and prove another arbitration, or some sufficient reason why it has become unnecessary or impossible." 6 JOHN ALAN APPLEMAN, ET AL., INSURANCE LAW AND PRACTICE, § 3922 at 520 (West 1972) (citation omitted).

In *Rainwater*, the arbitration clause contained "condition precedent" language like Safety's policies: "The voluntary dispute settlement process provided herein shall be a *condition precedent to the commencement* of any litigation by any party to compel compliance with the warrant documents or to seek relief for any dispute arising out of this program." 944 F.2d at 192 (emphasis added). The Fourth Circuit disposed of the argument that the "condition precedent" language meant non-binding arbitration, explaining:

> Though NHIC's claim has some surface appeal, we think the "condition precedent" language cannot carry all the weight NHIC would ascribe to it. Traditionally, federal courts were hostile to arbitration clauses since it was thought they could be avoided at the whim of either party. As a result,

> parties frequently included "condition precedent" language to make certain that the arbitration process ran its course before a federal court could entertain a suit. *Therefore, we read "condition precedent" to some extent as an artifact left over from the days of hostility toward arbitration. To the extent that the phrase has meaning, we find that it does not undermine the binding nature of arbitration*, but instead applies to the confirmation process permitted by 9 U.S.C. § 9, or to other litigation in which the arbitration award would be final but just a sub-text in some larger litigation context.

944 F.2d at 194 (citations omitted) (emphasis added).

The Fifth Circuit is in accord. In *McKee*, the arbitration clause provided: "The dispute settlement process *shall precede any litigation* attempted by either party on items that are specifically included in this warranty." 45 F.3d at 983 n.2 (emphasis added). The Fifth Circuit rejected the argument that this language made the parties' arbitration non-binding:

> We think this "*federal policy favoring arbitration*" covers more than simply the substantive scope of the arbitration clause – i.e., whether the Kilpatricks' claims were properly submitted to arbitration – and *encompasses an expectation that such procedures will be binding*. As a matter of federal law, the language of the warranty agreement is not sufficiently specific to call for non-binding arbitration.

Id. at 985 (emphasis added).

These decisions by Fourth and Fifth Circuits demonstrate the arbitration clause in Safety's policies confirmed the parties' intent to resolve their disputes by binding arbitration. The "condition precedent" language, which was written in the years when many jurisdictions were still hostile to arbitration as an alternative to litigation, does not express the parties' intention to engage in a "non-binding" process. Read in context, the language "condition precedent to any right of action" refers to the "offensive" use of an arbitration award, *i.e.*, execution on or the enforcement of a money judgment, and does not constitute an agreement to engage in a non-binding proceeding.

The absence of words specifying "final and binding" arbitration is of no import. Magic words are not necessary to make an arbitration binding. *Rainwater*, 944 F.2d at 193. Rather, in the case of a non-binding procedure, the opposite is true. There must be specific language in the agreement that calls for a non-binding process. *McKee*, 45 F.3d at 985. In the absence of such language, the expectation is that the arbitration will be binding. *Id.*

Nevertheless, in conflict with the decisions of the Fourth and Fifth Circuits, the Eighth Circuit concluded, in this case and *Dow Corning*, that the parties bargained for non-binding arbitration in the absence of extrinsic evidence that binding arbitration was intended. Pet. App. 2a-3a; 335 F.3d at 745-46. The Eighth Circuit ignored that Safety's clause required the arbitrators to make their "decision with regard to the custom and usage of the insurance and reinsurance business." Pet. App. 17a.

The agreement's incorporation of insurance and reinsurance custom and usage is indistinguishable from those agreements that incorporate American Arbitration Association rules. The fact there was no custom and usage evidence in the record

is irrelevant. The insurance custom and usage were self-proving. By unanimously finding the arbitration binding, the three arbitrators necessarily followed insurance and reinsurance custom and usage, of which they were experts.[2] Pet. App. 17a. The board's members were "active or retired, disinterested officials of insurance or reinsurance companies." *Id.*

This case and *Dow Corning* illustrate how important the finality of arbitration is. Shook & Fletcher and Dow Corning are two of many corporations that have found themselves at the center of a mass tort. Mass tort litigation is a present legal reality. The defendants in mass tort cases turn to their insurers. Their insurers then turn to their reinsurers, which may be United States or, more often, international companies. "The arbitrability of disputes may be particularly important for the reinsurance industry because of its international scope." 14 ERIC MILLS HOLMES, ET AL., HOLMES' APPLEMAN ON INSURANCE 2D, § 107.2 at 545 (LEXIS 1999); *see also Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985) (policy for arbitration applies with special force in international commerce). Most of those reinsurance agreements have arbitration clauses, and many provide that arbitration is a "condition precedent" to litigation. Because of the Eighth Circuit's decisions in this case and *Dow Corning*, parties must now question whether they can count on an efficient, expeditious dispute resolution procedure.

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2. Even the arbitrator who ruled for Shook & Fletcher on the merits joined the other two arbitrators in concluding the arbitration was binding. Pet. App. 10a. Similarly, in *Dow Corning Corp. v. Safety Nat'l Cas. Corp.*, 335 F.3d 742 (8th Cir. 2003), a different thee-member arbitration panel concluded their award was binding, although the panel's decision on certain coverage issues was not unanimous.

3. Binding arbitration is the norm under the FAA.

The Eighth Circuit's decisions conflict with the FAA's goal of overcoming judicial hostility to arbitration and undermine the liberal federal policy favoring binding arbitration. Shook & Fletcher and Safety were parties to a valid arbitration agreement that called for mandatory arbitration of their insurance coverage dispute. Pet. App. 17a. In concluding the arbitrators' decision was not binding, the district court and the Eighth Circuit ignored the federal policy favoring binding arbitration, the Eighth Circuit's own precedent, the decisions of other circuit courts of appeal, and the universally accepted understanding that arbitration provides for the final and binding resolution of disputes.

The Court should declare, consistent with decisions by the Fourth, Fifth, Seventh, and Tenth Circuits, that binding arbitration is presumed, absent specific language demonstrating that the parties intended a non-binding procedure. A uniform presumption in favor of binding arbitration is consistent with the Court's precedent. The Court has declared that once a court finds there is an enforceable agreement to arbitrate, the court has no further role, and all other questions are for the arbitrator to decide, including procedural issues that bear on the dispute's "final disposition." *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002); *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 557 (1964).

Consistent with the arbitrators' decisions in this case and *Dow Corning*, the Eighth, Fourth, Fifth, Seventh, and Tenth Circuits, have held the federal policy contemplates *binding* arbitration. The Eighth Circuit, contrary to its decisions in this case and *Dow Corning*, has held a valid arbitration award "carrie[s] with it *an implied agreement to be bound*." *Wabash*

Ry. Co. v. American Refrigerator Transit Co., 7 F.2d 335, 351 (8th Cir. 1925) (emphasis added).[3] The Fourth Circuit has held there is a judicial "presumption that one submits to arbitration, as opposed to mediation, precisely *because of* the binding quality of the process." *Rainwater v. National Home Ins. Co.*, 944 F.2d 190, 192 (4th Cir. 1991) (emphasis in original). The Fifth Circuit has observed the federal policy favoring arbitration "encompasses an expectation that such procedures will be binding." *McKee v. Home Buyers Warranty Corp. II*, 45 F.3d 981, 985 (5th Cir. 1995). The Seventh Circuit has held an arbitration agreement is "a contractual commitment to abide by the arbitrator's result." *Chicago Typographical Union No. 16 v. Chicago Sun-Times, Inc.*, 935 F.2d 1501, 1505 (7th Cir. 1991). The Tenth Circuit presumes an arbitration is intended by the parties to be the exclusive means of resolving their disputes under a contract. *P & P Indus., Inc. v. Sutter Corp.*, 179 F.3d 861, 866 (10th Cir. 1999).

The federal policy for binding arbitration comports with the term's common and ordinary meaning. Arbitration is the reference of a dispute to an impartial third person, chosen by the parties to the dispute who agree, in advance, "to *abide* by the arbitrator's award." *General Motors Corp. v. Pamela Equities Corp.*, 146 F.3d 242, 246 (5th Cir. 1998) (emphasis added). Non-binding arbitration is an oxymoron. BLACK'S LAW DICTIONARY defines "arbitration" as "[a] method of dispute resolution involving one or more neutral third parties who are [usually] agreed to by the disputing parties and whose decision is binding. – Also termed (redundantly) *binding arbitration*."

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3. In *Dow Corning*, the Eighth Circuit acknowledged that the federal policy favors *binding* arbitration and that binding arbitration is "the norm under the FAA." 335 F.3d at 746, 747. However, without explanation or citation to any authority, the Eighth Circuit held the policy does not apply to insurance coverage disputes. *Id.* at 746.

BLACK'S LAW DICTIONARY 100 (7th ed. 1999) (emphasis in original). *See also* BRYAN A. GARNER, DICTIONARY OF MODERN LEGAL USAGE 73 (2d ed. 1995) ("The results of arbitration are binding – that is, the parties to the arbitrator's decision are bound by it.")

There is an expectation in the marketplace that arbitration brings finality to disputes.

> *Every [arbitration] award rendered in compliance with all legal requirements is a complete and binding determination of a controversy* and may not be disturbed except on equitable or statutory grounds. . . . *The award is conclusive on all matters submitted to the arbitrators. When the parties choose to adjust their disputes through the arbitral process, the award is final* and, under such an agreement, neither party can hope again to litigate the same points successfully.

21 RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS BY SAMUEL WILLISTON, § 57:115 at 587 (4th ed. 2001) (footnotes omitted) (emphasis added).

"The object of arbitration is to achieve a *final disposition* of the differences between the parties in an easier, more expeditious, and less expensive manner than by litigation." 20 JOHN ALAN APPLEMAN, ET AL., INSURANCE LAW AND PRACTICE, § 11431 at 592 (West 1972) (emphasis added). Unlike mediation, "the essence of the arbitration process is that an arbitral award shall put the dispute to rest." Comment, *Judicial Deference to Arbitral Determinations: Continuing Problems of Power and Finality*, 23 UCLA L. REV. 936, 948-49 (1976). Even in the absence of an express agreement making the arbitration final and binding, "conclusiveness is expected." *Id.*

The very meaning of the term "arbitration" connotes a final and binding award. MARTIN DOMKE, THE LAW AND PRACTICE OF COMMERCIAL ARBITRATION, § 1.01 at 1 (1968). Arbitration's defining characteristic is a final and binding disposition of a controversy or dispute. THOMAS H. OEHMKE, COMMERCIAL ARBITRATION, § 2.1 at 15 (1987).

The expectation in the insurance context is no different. Insurance is a business in interstate commerce. *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 539 (1944). Therefore, an agreement to arbitrate an insurance dispute is no less subject to the federal policy under the FAA for binding arbitration than any other contract.

Insurance custom and usage demonstrate insurance-related arbitrations are meant to be binding.

> Arbitration clauses are common in insurance contracts. They have been included in insurance policies for many years. . . . In most cases, private agreements to arbitrate involve binding arbitration. The parties seek to avoid costly, time-consuming litigation by agreeing to submit all disputes for binding decision by an arbitrator or panel of arbitrators.

AMERICAN ARBITRATION ASS'N, INSURANCE ADR MANUAL, § 4.03 at 57 (1993). "Parties generally appreciate the advantage of arbitral finality and recognize that appeals will delay the ultimate resolution of the dispute." *Id.* at § 6.25 at 122. "In general, a very high degree of finality is accorded to most arbitration decisions." ROBERT E. KEETON, ET AL., INSURANCE LAW: A GUIDE TO FUNDAMENTAL PRINCIPLES, LEGAL DOCTRINES, AND COMMERCIAL PRACTICES, at 1091 (1988).

Further, in this case and in *Dow Corning Corp. v. Safety Nat'l Cas. Corp.*, 335 F.3d 742 (8th Cir. 2003), which involved an identical arbitration clause, two separate arbitration panels – six different arbitrators in all – following "the custom and usage of the insurance and reinsurance business," unanimously concluded their decisions were binding. Pet. App. 10a, 17a; *Dow Corning*, 335 F.3d at 744-45.

The FAA permits private parties to "'trade[] the procedures . . . of the courtroom for the simplicity, informality, and expedition of arbitration,'" which is usually cheaper and faster than litigation. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31 (1991) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)); *see also Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 280 (1995) (citing H.R. REP. No. 97-542, 97th Cong., 2nd Sess. 13 (1982), *reprinted in* 1982 U.S.C.C.A.N. 765, 777). There is no trade, and the federal policy is emasculated, when a reviewing court ignores the arbitrators' findings and sends the parties to litigation after they have devoted significant time and resources to arbitration.

Shook & Fletcher and Safety have been involved in this insurance coverage dispute since 1993. The arbitration took a matter of days. The balance of time has been spent in the courts. They have spent substantial sums to resolve their differences. They have litigated in Alabama state court. They have been to the district court and to the Eighth Circuit. Although they agreed to arbitrate *all* disputes arising out of the policy, the Eighth Circuit held their arbitration was nothing more than a precondition to litigation.

Absent review by the Court, Shook & Fletcher and Safety, as well as similarly situated parties, will be faced with non-binding arbitration as a prelude to litigation, a consequence that

thwarts the objective of the liberal federal policy behind the FAA. As the Eighth Circuit's decision undermines the federal policy favoring binding arbitration, certiorari should issue so the Court may declare a uniform presumption for binding arbitration in every arbitration agreement subject to the FAA.

II. The Eighth Circuit Has Created A Standard Of Review That Clashes With The Court's Dictates And Is At Cross-Purposes With The Federal Policy, Which Requires Any Doubts Concerning The Scope Of Arbitrable Issues To Be Resolved In Favor Of Arbitration.

The Eighth Circuit's opinion affirming the district court's decision that the arbitrators exceeded their authority in declaring their award to be binding subjected the parties' agreement to arbitrate to the same judicial hostility that the FAA was designed to combat when it was enacted more than seventy-five years ago, and, therefore, runs afoul of the federal policy favoring arbitration. "[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is *the construction of the contract language itself* or an allegation of waiver, delay, or a like defense to arbitrability." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983) (emphasis added). This is so even where the scope of an arbitration clause is ambiguous. *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 62 (1995).

A reviewing court must affirm an arbitration award so long as the arbitrators are even arguably construing or applying the contract and acting within the scope of their authority. *United Paperworkers Intern'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 38 (1987). A reviewing court must affirm even if the court is convinced the arbitrators have "committed serious error." *Id.*

Thus, where the arbitration clause is broadly written, all doubts should be resolved in favor of arbitration, "'unless it may be said with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the asserted dispute.'" *AT&T Technologies, Inc. v. Communication Workers of America*, 475 U.S. 643, 650 (1986) (citations omitted).

The Eighth Circuit's decision violates these standards. The arbitration clause in Safety's policy is certainly susceptible to the conclusion that the parties contemplated binding arbitration. As a matter of contract interpretation and procedure affecting the dispute's "final disposition," it was an issue reserved for the arbitrators' exclusive determination. *Green Tree Fin. Corp. v. Bazzle*, __ U.S. __, 123 S. Ct. 2402, 2407 (2003); *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002).

The Eighth Circuit compounded its disregard for the Court's precedent and the federal policy by placing the burden of proof on Safety to prove the arbitration provision called for binding arbitration. The Eighth Circuit affirmed the district court's decision because "the record contains no extrinsic evidence relevant to construing the ambiguous arbitration provision." Pet. App. 3a.

The Eighth Circuit ignored that Shook & Fletcher was the movant under 9 U.S.C. § 10. Therefore, Shook & Fletcher had the burden of proving that the arbitrators' award should be vacated, not Safety. *Southern Cal. Gas Co. v. Utility Workers Union of Am., Local 132, AFL-CIO*, 265 F.3d 787, 796 (9th Cir. 2001); *ANR Coal Co., Inc. v. Cogentrix of N.C., Inc.*, 173 F.3d 493, 500 (4th Cir. 1999); and *Folkways Music Publishers, Inc. v. Weiss*, 989 F.2d 108, 111 (2d Cir. 1993). If the Eighth Circuit believed there was a gap in the evidentiary record as to the parties' intent, it should have held that Shook & Fletcher failed to sustain its burden of proof, and reversed the

district court's order vacating the arbitrators' finding that their award was binding.

The Eighth Circuit's decision demonstrates why the Court should declare that the presumption under the FAA is for binding arbitration. By ignoring the standard of review, by disregarding the federal policy favoring binding arbitration, and by subjecting Safety to the burden of proof on whether the parties' agreement provided for binding arbitration, the Eighth Circuit has turned the federal policy upside down. Contrary to the Court's decision in *Green Tree*, a court, and not the arbitrators, decided what kind of arbitration proceeding the parties had agreed to, a question of contract interpretation and arbitration procedure that the Court has reserved for the arbitrators' exclusive determination. 123 S. Ct. at 2407.

The presumption for arbitration extends to all attendant procedural issues, including those which affect the "final disposition" of the case. *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002); *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 557 (1964). Consistent with the arbitrators' decision, the presumption demonstrates that binding arbitration was intended. Contrary to the Eighth Circuit's opinion, if the federal presumption were to be rebutted and the decisions of the arbitrators on procedural issues and matters of contract interpretation were to be overturned, the burden of proof rested with Shook & Fletcher, and not Safety. As made plain by the Eighth Circuit's opinion, Shook & Fletcher offered no evidence supporting its position. Pet. App. 3a.

Finally, there was evidence of insurance custom and usage favoring binding arbitration in the record. The evidence of insurance custom and usage was self-proving. In deciding the case, the arbitrators were bound to make their "decision with regard to the custom and usage of the insurance and reinsurance

business." Pet. App. 17a. By unanimously finding the arbitration binding, the three arbitrators, who were "active or retired, disinterested officials of insurance or reinsurance companies," necessarily followed insurance custom and usage, of which they were experts. Pet. App. 17a. Indeed, the agreement's incorporation of insurance industry custom and usage to govern the arbitration is indistinguishable from those arbitration agreements that incorporate the rules of the American Arbitration Association, and should be no less dispositive on the binding nature of the arbitration. *Cf. Rainwater v. National Home Ins. Co.*, 944 F.2d 190, 192-93 (4th Cir. 1991) (incorporating the American Arbitration Association's rules for entry of judgment on an arbitration award makes the arbitration binding).

The Eighth Circuit should not have placed the burden of proof on Safety. The Eighth Circuit's departure from the Court's precedent and the federal policy favoring binding arbitration "so far depart[s] from the usual course of judicial proceedings" and from settled law that it calls for correction through this Court's power to supervise the actions of the lower federal courts. S. Ct. R. 10(a). Therefore, a writ of certiorari is warranted to review the Eighth Circuit's decision.

CONCLUSION

A writ of certiorari should be granted as the Eighth Circuit's opinion will be precedent which will be seized by all "losers" to disrupt the final and binding resolution of disputes by arbitration, including those between insurers, their insureds, and other insurance companies.

Respectfully submitted,

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APPENDIX

APPENDIX A — PER CURIAM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT DECIDED OCTOBER 21, 2003

UNITED STATES COURT OF APPEALS
EIGHTH CIRCUIT

No. 03-1092

Submitted July 22, 2003
Decided Oct. 21, 2003

SHOOK & FLETCHER ASBESTOS SETTLEMENT TRUST,

Plaintiff-Appellee,

v.

SAFETY NATIONAL CASUALTY CORPORATION,

Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Missouri.

Before LOKEN, Chief Judge, FAGG and MORRIS SHEPPARD ARNOLD, Circuit Judges.

PER CURIAM.

A flood of asbestos-related damage claims against Shook and Fletcher Insulation Co., an insulation contractor, led to coverage disputes between Shook and Fletcher and its many

liability insurers. In November 1997, an Alabama state court ordered the parties to arbitrate this dispute, which involves an excess umbrella policy issued to Shook and Fletcher by Safety National Casualty Corporation. The arbitration panel issued a decision in favor of Safety National and declared its award to be binding. Shook and Fletcher moved to vacate the award under section 10 of the Federal Arbitration Act, 9 U.S.C. § 10, arguing that the panel exceeded its authority in declaring its decision to be binding. The district court[1] agreed that the arbitration is non-binding and vacated that portion of the award. Safety National appeals, arguing the issue was a procedural matter for the arbitrators to decide, and their decision must be upheld under the deferential standard of review mandated by the Federal Arbitration Act.

In *Dow Corning Corp. v. Safety Nat'l Cas. Corp.*, 335 F.3d 742 (8th Cir. 2003), we considered the same arbitration clause in Safety National policies issued to another insured. We concluded that the issue whether the parties contracted for binding or non-binding arbitration went to the scope of the arbitrators' authority and was therefore beyond their authority to resolve. We further concluded that the clause in the Safety National policy was ambiguously silent on this issue. Lacking extrinsic evidence in the record, such as evidence of custom and usage, we held that the policies provided for mandatory but non-binding arbitration. Accordingly, we vacated the arbitrators' declaration to the contrary.

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1. The HONORABLE CAROL E. JACKSON, Chief Judge of the United States District Court for the Eastern District of Missouri.

Appendix A

This case presents the same issues we decided in *Dow Corning*. Once again, the record contains no extrinsic evidence relevant to construing the ambiguous arbitration provision. Therefore, *Dow Corning* is controlling. As the district court's decision is consistent with our later decision in *Dow Corning*, we affirm.

APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI, EASTERN DIVISION FILED NOVEMBER 25, 2002

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 4:99-MC-133 (CEJ)

SHOOK & FLETCHER INSULATION CO.,

Plaintiff,

vs.

SAFETY NATIONAL-CASUALTY CORP.,

Defendant.

MEMORANDUM AND ORDER

This matter is before the Court on the motion of Shook & Fletcher Insulation Company (SFI) to vacate an arbitration award entered against it and in favor of defendant Safety National Casualty Corp. (Safety National). The issues are fully briefed.

The issue submitted to arbitration was whether an insurance policy sold to SFI by Safety National provided coverage for SFI's asbestos-related liabilities. The arbitration panel adopted Safety National's interpretation of the policy and, further, found that its decision was binding. SFI does

not challenge the arbitration panel's decision on the merits; rather, it contends that the arbitration panel exceeded its authority when it determined that its decision was binding. Accordingly, SFI asserts that the award should be vacated.

I. *Factual Background*

Between 1955 and 1986, SFI purchased forty primary and excess general liability policies from fourteen insurance companies. Safety National sold four policies to SFI between August 1983 and June 1986. In 1993, following a flood of personal injury lawsuits, SFI and several other companies involved with asbestos-containing products entered into a class-action settlement to resolve future claims against them. In 1993, the parties sought court approval of the settlement. *See Georgine v. Amchem Products, Inc.*, 83 F.3d 610 (3d Cir. 1996) (setting out litigation and settlement history), *aff'd*, 521 U.S. 591 (1997). The district court certified the class and approved the settlement; however, the Third Circuit subsequently vacated the order certifying the class. *Id.*

During the pendency of the *Georgine* case, Safety National filed an action in an Alabama state court, seeking a declaration that it was not obligated to provide coverage or defend SFI for asbestos related injuries under the policies it sold to SFI. SFI filed a counterclaim against Safety National and seven other insurers, seeking a declaration that it was entitled to coverage. One of the SFI policies—Policy UF 1490 AL—contained an arbitration provision. The Alabama court ordered arbitration on that policy and scheduled trial on the remaining claims. Shortly before trial, SFI settled its litigation with all of its insurers other than Safety National. SFI and

Safety National then agreed to dismiss their claims in the Alabama case without prejudice.

The parties proceeded to arbitration on Policy UF 1490 AL, an excess umbrella liability policy. The policy contained the following arbitration provision: "As a condition precedent to any right of action under this Policy, any dispute arising out of this Policy shall be submitted to the decision of a board of arbitration." Among other things, the arbitration panel unanimously agreed that "this arbitration is binding on the parties."

II. *Discussion*

SFI brings this action under 9 U.S.C. § 10(a), which provides that a district court may vacate an arbitration award on the following grounds: (1) the award was procured by corruption, fraud, or undue means; (2) there was evident partiality or corruption in the arbitrators; (3) the arbitrators were guilty of misconduct or misbehavior prejudicing the rights of a party; and (4) the arbitrators "exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made." It is this last ground upon which SFI seeks an order vacating the arbitrators' award. The focus of SFI's motion is the panel's unanimous decision that the arbitration is binding.

The Federal Arbitration Act (FAA) compels courts to be extremely solicitous of both the arbitration process and its results. *Hoffman v. Cargill Inc.*, 236 F.3d 458, 461 (8th Cir. 2001). Judicial review of a final arbitration decision is

extremely narrow. *Bureau of Engraving, Inc. v. Graphic Communication Int'l Union*, 284 F.3d 821, 824 (8th Cir. 2002); *Trailmobile Trailer, LLC v. International Union of Electronic Electrical, Salaried, Machine & Furniture Workers, AFL-CIO*, 223 F.3d 744, 746 (8th Cir. 2000). "[A]s long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision." *Id.* (quoting *United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 38 (1987). In addition to the grounds enumerated in § 10(a), a court may set aside an award if it fails to draw its essence from the contract. *Osceola Cty. Rural Water Sys., Inc. v. Subsurfco, Inc.*, 914 F.2d 1072, 1075 (8th Cir. 1990)

"[A]rbitration is simply a matter of contract between the parties; it is a way to resolve those disputes—*but only those disputes*—that the parties have agreed to submit to arbitration." *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995) (emphasis added); *id.* at 945 (a party can be forced to arbitrate only those issues it has specifically agreed to submit to arbitration). For example, the question of who should decide whether the parties agreed to arbitration —the arbitrators or the courts—may be decided by the arbitrators only where there is "clear and unmistakable evidence" that the parties agreed that the arbitrators should decide arbitrability. *Id.* at 944-45 (law treats silence or ambiguity about *who* should decide arbitrability differently from the question of *whether* a dispute is arbitrable) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985) and *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983)).

Appendix B

The question before the Court is whether the parties agreed to binding arbitration. As noted above, the arbitration provision at issue stated that, "As a condition precedent to any right of action under this Policy, any dispute arising out of this Policy shall be submitted to the decision of a board of arbitration." There is no explicit agreement that the decision of the board will be binding. The absence of an explicit agreement is not determinative, however, as arbitration may be binding upon the parties where the rules under which the arbitration is conducted call for binding arbitration. *See McKee v. Home Buyers Warranty Corp.*, 45 F.3d 981, 983 (5th Cir. 1995); *Rainwater v. National Home Ins. Co.*, 944 F.2d 190 (4th Cir. 1991) (arbitration in accordance with rules of the American Arbitration Association (AAA) is binding); *cf. Varley v. Tarrytown Assocs., Inc.*, 477 F.2d 208 (2d Cir. 1973) (arbitration conducted according to AAA rules not binding where AAA rules in effect at time did not allow for entry of judgment on arbitration). Although the arbitration provision in this case specified the requirements for the selection and qualification of the arbitrators, it did not contain any reference to the rules of a governing body such as the AAA. In the absence of either an explicit statement that arbitration was to be "final" or "binding," or the incorporation of rules requiring binding arbitration, the Court finds no basis for concluding that the parties agreed that arbitration would be binding. *See Oklahoma City Assocs. v. Wal-Mart Stores, Inc.*, 923 F.2d 791, 794 (10th Cir. 1991) ("We have found no court, absent explicit consent to have judgment entered and absent both a finality clause and an AAA Rules clause in the contract, that has found consent to have judgment entered by mere participation in an arbitration hearing.") Thus, the arbitrators exceeded their authority.

Appendix B

The Court is not required to vacate the award as a whole, however, because in this case the invalid and valid parts of the award are independent and severable. *Enterprise Wheel & Car Corp. v. United Steelworkers of America*, 269 F.2d 327, 330 (4th Cir. 1959), *rev'd in part on other grounds*, 363 U.S. 593 (1960); *see also* 6 *Corpus Juris Secundum* Arbitration § 117, Partial Invalidity (2002). The Court therefore will vacate only that portion of the arbitration order which provides that the arbitration is binding on the parties.

Accordingly,

IT IS HEREBY ORDERED that the motion of plaintiff Shook & Fletcher Insulation Co. to vacate arbitration award [#1] is **granted in part and denied in part**.

IT IS FURTHER ORDERED that the portion of the arbitration order providing that the arbitration is binding on the parties is **vacated.**

s/ Carol E. Jackson
CAROL E. JACKSON
UNITED STATES DISTRICT JUDGE

Dated this 25th day of November, 2002.

APPENDIX C — ARBITRATION ORDER DATED APRIL 9, 1999

SAFETY NATIONAL CASUALTY CORPORATION
versus
SHOOK & FLETCHER INSULATION COMPANY
ARBITRATION UNDER POLICY OF 1490 AL

ARBITRATION ORDER

Having reviewed the evidence and the law, having judged the credibility of the witnesses, and having listened to the arguments of counsel, this panel's decisions and opinions on matters of law or mixed questions of fact and law are as follows:

I. The panel's unanimous decisions are that:

   A. This arbitration is binding on the parties.

   B. Safety National's asserted defense of material misrepresentation is denied.

   C. Safety National's asserted defense of "known loss" is denied.

II. The majority decisions of Messrs. Lyon and Nelson are that:

   A. The applicable trigger of coverage is the exposure trigger. By this it is meant that:

      1. This policy is triggered only when an asbestos claimant is exposed to Shook & Fletcher's asbestos products.

Appendix C

2. Only the primary and excess policies with policy periods in effect at the time of exposure(s) (i.e. inhalation) to Shook & Fletcher's products apply to a claim, not subsequent primary and excess policies with inception dates subsequent to the cessation of actual exposure(s) (inhalation).

3. As respects each asbestos claim, all triggered primary and excess coverage must be exhausted before Safety National has any obligation to pay under this policy.

B. The application of coverage under this policy should be determined on the basis of the following:

1. With respect to all triggered policies, the appropriate allocation of loss is pro rata as to the time at risk of this policy in comparison to the total time at risk of all applicable, triggered policies.

2. In the event of the Insolvency of an insurer(s), Shook & Fletcher shall be liable for the pro rata liability of such insolvent insurer(s).

3. Shook & Fletcher shall not allocate recoveries against Safety National with respect to periods when uninsured or for which other coverage is exhausted or otherwise unavailable.

4. As respects each asbestos claim, all triggered, primary and excess coverage must be exhausted before Safety National has any obligation to pay under this policy.

Appendix C

C. The Wellington Agreement violates this Safety National policy in that:

1. It constitutes a settlement agreement for pending claims.

2. Shook & Fletcher did not obtain Safety National's written consent.

3. It compromises Safety National's rights of subrogation.

4. It requires payment of claims that are not covered by this Safety National policy (e.g. payment by Shook & Fletcher because of any CCR products at a particular site). Such payments are voluntary and contrary to the legally obligated to pay provisions of this Safety National policy. These settlements may not be considered for purposes of determining exhaustion of the underlying policies except to the extent such payments would have been made absent the Wellington Agreement.

D. Each asbestos claim that otherwise satisfies the definition of "occurrence" constitutes a separate occurrence.

Appendix C

III. The minority opinions of Mr. Stewart are as follows:

A. With respect to the trigger of coverage, the policy language of bodily injury during the policy period, together with the known etiology of asbestos disease as a continuous and progressive injury, means that all policies from first exposure until death are triggered.

B. With respect to the scope or application of coverage, the policy language calls for payment of all liability arising from the triggering bodily injury. The insurance contract thus attaches to the underlying tort. If the tort liability is not segmented, by time or otherwise, then a succession of policies will all be fully obligated for the entire liability up to their limits, and those limits will cumulate.

C. With respect to the Wellington Agreement, payment by underlying insurers of Shook & Fletcher's obligations pursuant to that Agreement is reasonable and is payment of liability assumed by contract, and it exhausts the underlying coverage in the same way payment under settlements of other claims does.

_____
James A. Lyon, Umpire

on April 9, 1999 at La Canada, California

_____
Jack M. Nelson, Arbitrator

on April 9, 1999 at New Canaan, Connecticut

_____
Richard E. Stewart, Arbitrator

on April 9, 1999 at Chapel Hill, North Carolina

APPENDIX D — ORDER OF THE CIRCUIT COURT, TENTH JUDICIAL CIRCUIT OF ALABAMA FILED NOVEMBER 6, 1997

CIRCUIT COURT, TENTH JUDICIAL CIRCUIT OF ALABAMA

CASE NO. CV 93-1574 JDC

SAFETY NATIONAL CASUALTY CORPORATION

PLAINTIFF

vs.

SHOOK & FLETCHER INSULATION COMPANY

DEFENDANT

ORDER RE: MOTION TO COMPEL ARBITRATION

This cause came on to be heard upon the "Plaintiff Safety National Casualty Corporation's Motion To Compel Arbitration, Motion For An Expedited Hearing, And Motion To Stay This Action Pending Completion Of The Arbitration Proceedings" filed August 6, 1997, and after hearing statements and arguments of counsel, the Court finds that the following decretal orders are due to be entered.

It is, therefore, ORDERED, ADJUDGED and DECREED by the Court as follows:

ONE: The above-named motion is granted to the extent that the parties are ordered to arbitrate the issues involving

policy No. UF-1490-AL. The Court will not stay the proceedings as to the other policies and this case shall proceed as to the other policies.

TWO: Safety National Casualty Corporation is ordered to initiate arbitration proceedings within 30 days.

DONE and ORDERED this 6th day of November, 1997.

s/ Jack D. Carl
CIRCUIT JUDGE

APPENDIX E — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT DENYING PETITION FOR REHEARING AND FOR REHEARING EN BANC DATED NOVEMBER 24, 2003

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 03-1092

Shook & Fletcher Asbestos,

Appellee,

v.

Safety National Casualty Corp.,

Appellant.

ORDER DENYING PETITION FOR REHEARING AND FOR REHEARING EN BANC

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

November 24, 2003

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX F — EXCERPT FROM SAFETY NATIONAL CASUALTY CORPORATION POLICY NO. UF 1490 AL, EFFECTIVE AUGUST 16, 1983, TO DECEMBER 31, 1983

* * *

11. **Arbitration.** As a condition precedent to any right of action under this Policy, any dispute arising out of this Policy shall be submitted to the decision of a board of arbitration. The board of arbitration will be composed of two arbitrators and an umpire, meeting in St. Louis, Missouri, unless otherwise agreed.

The members of the board of arbitration shall be active or retired, disinterested officials of insurance or reinsurance companies. Each party shall appoint its arbitrator, and the two arbitrators shall choose an umpire before instituting the hearing. If the respondent fails to appoint its arbitrator within four weeks after being requested to do so by the claimant, the latter shall also appoint the second arbitrator. If the two arbitrators fail to agree upon the appointment of an umpire within four weeks after their nominations, each of them shall name three, of whom the other shall decline two and the decision shall be made by drawing lots.

The claimant shall submit its initial brief within twenty (20) days from appointment of the umpire. The respondent shall submit its brief within twenty (20) days after receipt of the claimant's brief and the claimant may submit a reply brief within ten (10) days after receipt of the respondent's brief.

The board shall make its decision with regard to the custom and usage of the insurance and reinsurance business.

Appendix F

The board shall issue its decision in writing based upon a hearing in which evidence may be introduced without following strict rules of evidence but in which cross examination and rebuttal shall be allowed.

If more than one Insured is involved in the same dispute, all such Insureds shall constitute and act as one party for purposes of this Clause and communications shall be made by the Company to each of the Insureds constituting the one party; provided, however, that nothing therein shall impair the rights of such Insureds to assert several, rather than joint, defenses or claims, nor be construed as changing the liability of the Insureds under the terms of this Policy from several to joint.

Each party shall bear the expense of its own arbitrator and shall jointly and equally bear with the other party the expense of the umpire. The remaining costs of the arbitration proceedings shall be allocated by the board.

* * * *